

No. 15085

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

LILICK, GEARY, MCHOSE, ROETHKE & MYERS,
GORDON K. WRIGHT,

634 South Spring Street,
Los Angeles 14, California,

Attorneys for Appellee.

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APPELLEE'S BRIEF.

Supplementary Summary of Facts.

By stipulation, the evidence establishes that Calnevar Company entered into a contract with Trans World Airlines, Inc., at St. Louis, Missouri, on July 10, 1954, for the air transportation of one crated vending machine and one carton of parts from St. Louis to Los Angeles. This contract was evidenced by Trans World Airlines' uniform airbill No. 15-STL-933916 [Tr. p. 41].

Said TWA airbill provided, "DECLARED VALUE—Agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon." The airbill indicates that no higher value was declared.

The airbill further provided on its face for a rate of \$16.55 per cwt., making a total weight-rate charge of \$40.55. In addition, the airbill shows pick-up charges of \$1.20; delivery charges of \$1.47; subtotal, \$43.22; transportation tax, \$1.30; and a grand total of \$44.52.

The parties to this action stipulated that there might be admitted into evidence (1) Trans World Airlines, Inc., airbill No. 933916, (2) Trans World Airlines, Inc., tariff filed with the Civil Aeronautics Board (or portion thereof), as set forth in certified true copy dated April 28, 1955, (3) Contract dated April 1, 1952, between Air Cargo, Inc., and Twentieth Century Delivery Service, Inc. [Pltf. Exs. 1, 2, 3 and 4, Tr. p. 41].

In addition to the provisions of Airfreight Rules Tariff No. 1-A, which are set forth in appellant's brief, pages 6 and 7, first revised page 16 of said Airfreight Rules Tariff No. 1-A [Pltf. Ex. 3, Tr. p. 43] provided in part:

"LIMIT OF LIABILITY.

"(a) In consideration of *carrier's rate* for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment as determined pursuant to Rule 4.3, the shipper and all other parties having an interest in the shipment agree that the value of the shipment shall be determined in accordance with the provisions of Rule 4.3 and that the total liability of the *carrier* shall in no event exceed the value of the shipment as so determined.

"(b) By tendering the shipment to *carrier* for transportation, the shipper, for himself and all other parties having an interest in the shipment, waives all claims for damages beyond the limitations set forth in these rules and regulations and affirms the description of the shipment as recited on the airbill, and the fact that the shipment is not of a nature unsuitable for carriage by air or hazardous thereto.

“(c) Except as provided in paragraph (e) of this rule, the total liability of the *carrier* shall in no event exceed—

“1. The value of the shipment as determined pursuant to Rule 4.3; or

“2. (No application to DAL or UAL) The actual value of the shipment and the time and place of shipment, or

“3. (No application to EAL) The amount of any damages actually sustained, whichever is the least.” (Emphasis added.)

By stipulation, the evidence establishes that a contract was entered into between Air Cargo, Inc., on behalf of Trans World Airlines, Inc., with Twentieth Century Delivery Service, Inc., dated April 1, 1952 [Tr. p. 42]. This contract [Pltf. Ex. 4] provided in part as follows:

“* * * 3. SUPERVISION OF CONTRACTOR’S PERSONNEL—Contractor (Twentieth Century) shall employ and direct all persons performing any of the services to be performed by Contractor hereunder, and such persons shall be and remain the sole employees of and subject to the exclusive control and direction of Contractor in the performance of such services. Neither the Company (Air Cargo, Inc.) nor any Air Carrier (Trans World Airlines, Inc.) shall have the right to control or direct any of the agents, servants, or employees of the Contractor, *it being the intention of the parties hereto that Contractor shall be and remain an independent contractor.* (Emphasis added.)

“* * * 8. LIABILITY, INDEMNITY AND NOTICE OF CLAIM.

“(a) Acts or Omissions of Contractor: The Contractor will protect, indemnify, and hold harmless the Air Carriers, the Company, and their officers, agents, servants, or employees, from and against all

loss, liability, damages, claims, demands, costs, and expenses that any one or more of them may suffer or incur on account of (1) injury to or death of persons and loss or destruction of or damage or delay to air freight or other property, including the conversion thereof, caused by or resulting in any manner from any acts or omissions, negligent or otherwise, of Contractor in performing or failing to perform any of the services or duties to be performed by the Contractor as herein provided * * *.

“(c) *Conclusiveness of Receipt*: Except for concealed loss or damage, in determining liability hereunder the statement of the condition of air freight appearing on any receipt issued by the Contractor or the Air Carrier at the time such air freight is received from the other party shall be conclusive. Such air freight shall be deemed to be in the custody or control of the Contractor from the time such air freight is delivered to Contractor by an Air Carrier or a shipper, as evidenced by the issuing of a receipt therefor by the Contractor to the Air Carrier or shipper as the case may be, until the time such air freight has been delivered to an Air Carrier or consignee, as evidenced by the taking of a receipt therefor by the Contractor from the Air Carrier or consignee as the case may be. * * *

“9. INSURANCE.

“(a) *Air Freight Insurance*: The Company will assume the liability imposed by law upon the Contractor for risks of loss or delay of, or damage to, air freight, including the liability arising under Contractor's agreement to indemnify the Air Carriers, and the Company, for any such loss, delay, or damage, assumed by the Contractor within the provisions of Section 8(a)(1) hereof, while such air freight is in the custody or control of Contractor,

up to the limits of \$100,000 as respects the contents of any one vehicle and \$250,000 on account of claims arising out of any one loss or disaster. It is the intention and understanding of the Air Carriers, the Company, and the Contractor that this assumption of liability is undertaken for the express purpose of establishing a uniform insurance and claim administration program embracing all motor carrier operators who are Contractors under this and similar Service Contracts with the Company. * * * In consideration of such assumption of liability and the maintenance of such insurance policy by the Company, the Contractor authorizes the Company to deduct and retain from compensation due the Contractor under Section 7 hereof, an amount equal to Two and one-half ($2\frac{1}{2}$) per cent of such compensation.”

The court below found as a fact and concluded as a matter of law that Twentieth Century Delivery Service, Inc., negligently dropped and damaged the prototype automatic coffee vending machine in question on July 12, 1954 [Tr. pp. 32 and 35]. Appellant concedes its liability for negligence in this appeal by withdrawing as an assignment of error the trial court’s finding and conclusion on the question of negligence (Appellant’s Br. p. 9).

The prototype automatic coffee vending machine, which is the subject of this action, was insured by Calnevar Company with St. Paul Fire & Marine Insurance Company, and it was stipulated by the parties that St. Paul Fire & Marine Insurance Company was subrogated to whatever rights in the premises belonged to Calnevar Company [Tr. p. 44]. In addition, it was established by the evidence that St. Paul Fire & Marine Insurance Company paid Calnevar Company in the amount of \$9,625.25,

in satisfaction of its liability under the insurance policy [Tr. p. 91]. Payment of this amount was made pursuant to a report prepared by the Mat Graham Company, dated August 13, 1954 [Deft. Ex. A, Tr. p. 92].

The record shows that the prototype automatic coffee vending machine was invented, designed and patented by the Chief Engineer of Calnevar Company, Harold E. Sloier, whose deposition was read into evidence [Tr. p. 47]. Mr. Sloier testified that if he were to have invested his own money in developing the machine as of the time it was displayed in St. Louis, the total amount would have been between \$75,000 and \$100,000 [Tr. p. 51].

The record further shows that Calnevar Company had sent the prototype automatic coffee vending machine to St. Louis for display and that at the time the machine was damaged there were plans for showing it in other cities for the purpose of either selling the machine outright or creating sufficient interest in potential purchasers to warrant mass production of the machine at a competitive price [Tr. pp. 51 and 52].

The testimony of Mr. Sloier further reveals that the machine was laid-up for repairs for three or four months. Mr. Sloier stated:

“We in the trade say a machine of this type has a shelf life. Once you show it to the trade, you see, you have now shown them your hole card. From thereon on in it is a race between the time you get in production and the time your competitors will pirate items from the machine which are advantageous to them. So during this time it laid in this repair deal we could not show it and he cancelled showings in several cities, Mr. Plotkin did. Finally this machine was sold at a loss, an actual loss, to someone else in this particular area” [Tr. pp. 53 and 54].

ARGUMENT.

The appellee submits that the trial court ruled correctly in holding:

1. That the defendant Twentieth Century was not entitled to the benefit of the declared valuation pursuant to the TWA airbill and Airfreight Rules Tariff No. 1-A.

2. That Calnevar, and thereby the plaintiff, St. Paul Fire and Marine Insurance Company, suffered loss in the amount of \$9,625.25 by reason of damage to the prototype automatic coffee vending machine.

I.

The Defendant, Twentieth Century, Was Not Entitled to the Benefit of the Declared Value Provisions of the TWA Airbill and Airfreight Rules Tariff No. 1-A.

A. Airfreight Rules Tariff No. 1-A, Rules 3.1(b) and 3.1(c), Are Invalid and Ineffective Insofar as They Purport to Limit the Appellant's Liability for Negligence.

The limitation of liability benefits claimed by the appellant under Airfreight Rules Tariff No. 1-A are inapplicable because the governing statute does not authorize airfreight tariffs to control ground services rendered by appellant. (49 U. S. C. A., Secs. 401 *et seq.*)

Section 483 of Title 49 pertains to the functions and powers of the Civil Aeronautics Board in connection with approval and promulgation of tariffs:

“§483. Tariffs of air carriers.

“(a) Every *air carrier* and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for *air transportation* between

points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such *air transportation*. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.” (Emphasis added.)

Section 401 of Title 49, United States Code, defines various terms that are used in regulating civil aeronautics as follows:

“§401. DEFINITIONS.

* * * * *

“(2) ‘Air carrier’ means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

* * * * *

“(10) “Air transportation’ means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.”

There is no evidence in the record nor any claim whatsoever advanced by Twentieth Century that it is or was an air carrier. Appellee contends that under the plain meaning of Title 49, Section 483, there is no statutory authority for an air carrier to file tariffs with the Civil Aeronautics Board purporting to limit the liability of companies which perform ground services. In particular, Section 483 requires “air carriers” to file tariffs showing rates, fares and charges for “air transportation” and no mention is made therein of the filing by an air carrier of tariffs which govern or regulate the conduct of ground services by persons or companies other than the air carriers.

The record is silent as to whether any tariff was filed with the Civil Aeronautics Board which purported to encompass the services rendered by appellant or provide rates therefor. Appellant is not an “air carrier” nor does appellant perform “air transportation” and, therefore, any tariff filed by an air carrier is a nullity with respect to the appellant’s liability for negligence.

This interpretation of Title 49, U. S. C. A., Section 483, is borne out by the decisions in several analogous cases. A leading case on this point is *Shortley v. Northwestern Airlines*, 104 Fed. Supp. 152 (D. C., D. C., 1952). The issue there was whether an air carrier’s tariff, which required notice of injury to be submitted within ninety days and commencement of suit within one year, was binding upon a passenger. The passenger urged that this provision was not a binding term of the contract between him and the airline regardless of its inclusion in the pub-

lished tariff. In construing Title 49, Sections 401 *et seq.*, the court sustained the passenger's contention, holding the limitation void, saying:

"* * * Unquestionably, with respect to rates or matters affecting rates, the character of services to be performed, practices relating to the services to be rendered and matters required by the Civil Aeronautics Act of 1938, 49 U. S. C. A., §401 *et seq.*, or by regulations promulgated by the Civil Aeronautics Board pursuant to said Act, the tariff regulations do as a matter of law control the carrier and the passenger or shipper, and this without any actual notice or knowledge other than the constructive notice afforded by the filing of such tariffs so required. Nowhere, however, in the Act of Congress, or in the regulations promulgated by the Board, is there any authorization or requirement for the inclusion in a tariff of any provision respecting limitation upon notice of claims or upon the time for commencement of actions thereon. Unquestionably, when a lower rate is charged for the transportation of baggage or property, based upon the valuation thereof, than would be charged for its transportation if of greater value, appropriate tariff provisions do affect the rates and charges and are constructive notice to a passenger or shipper. *Where a tariff provision is gratuitously inserted with respect to a matter other than that contemplated or required by the Act of Congress, or the regulations made pursuant thereto, a passenger or shipper is not chargeable with notice as a matter of law with respect thereto.*" (104 Fed. Supp. at 155.) (Emphasis added.)

The case of *Thomas v. American Airlines, Inc.*, 104 Fed. Supp. 650 (E. D. Ark., 1952), reached an identical conclusion on the same issue. The court succinctly stated:

“The limitation period for giving notice and bringing suit in the tariffs of a common carrier are binding upon passengers only if there is a statutory authority for filing such tariff, that is, the statute controlling requires its filing.”

Toman v. Mid-Continental Airlines, Inc., 107 Fed. Supp. 345 (W. D. Mo., 1952), cited the language of Title 49, U. S. C. A., Section 483, and, in reliance upon the *Shortley* case, *supra*, overruled the defendant's motion to dismiss, holding that the limitation of time to sue provided by the tariff was invalid.

To the same effect is *Turoff v. Eastern Airlines, Inc.*, 129 Fed. Supp. 319 (N. D. Ill., 1955).

Another recent case which has denied the validity of a tariff provision limiting the time to sue is *Bernard v. U. S. Air Coach*, 117 Fed. Supp. 134 (S. D. Cal., 1953). Judge Tolin, noting the absence of any appellate court decisions respecting the validity of a gratuitous insertion in a tariff by an air carrier, accepted the reasoning and holding of the *Shortley*, *Thomas* and *Toman* cases, *supra*. The court stated:

“The gratuitous, unilateral act of said defendant in filing what was not required, was entirely ineffectual and this court holds, as to this point, to the same effect as the United States District Court for the District of Columbia in *Shortley v. Northwestern Airlines.*” (117 Fed. Supp. at 142.)

Lichten v. Eastern Airlines, Inc., 189 F. 2d 939 (2nd Cir., 1951), concerned the validity of an air tariff which excused the carrier from any liability for loss of jewelry and other valuables. In an action brought by a passenger for the loss of luggage containing jewelry, the court sustained the airline's defense under the tariff, stating that these rules became a part of a contract between the plaintiff and the carrier. The *Lichten* case is distinguishable from the present appeal in that tariffs were also filed which would have permitted the passenger to declare the luggage value and, by paying an additional fare, secure complete protection against loss. Appellee submits that no such election was afforded the shipper (Calnevar) with respect to the services rendered by appellant in the instant case. In addition, the *Lichten* case concerned the validity of air tariffs applicable to an air carrier, whereas the question in the instant appeal is whether a ground service company can receive the benefits of an air tariff.

The court in the *Lichten* case, while recognizing that Title 49, Section 401, *et seq.*, did not expressly provide for limitation of liability by the carrier, nevertheless noted that such provisions were not prohibited by the statute and concluded that until the Civil Aeronautics Board repudiated such provisions they must be deemed acceptable by the Civil Aeronautics Board and therefore valid. Judge Frank, dissenting, took exception to this line of reasoning and, analogizing to the provisions of the Carmack Amendment to the Interstate Commerce Act, argued that no tariff limitation of liability should be honored in the absence of express authorization in the enacting statute. Regardless of this diversity of opinion, as displayed in the *Lichten* case, appellee submits that there is no room for such argument in the present appeal since this case con-

cerns the liability of a ground carrier which is entirely outside the scope of the controlling statute.

Another persuasive case is *Pacific S.S. Co. v. Cackette*, 8 F. 2d 259 (9th Cir., 1925), certiorari denied 269 U. S. 586 (1926). The court held that an ocean carrier could not evade liability by a tariff provision which required the passenger to file claims within ten days. Not only was there no actual or constructive notice of this term brought to the attention of the passenger, by means of the ticket, but the court further concluded that the tariff which had been filed pursuant to the Shipping Act was only required by that Act to establish just and reasonable rates, fares, and regulations, and that the Act contained no provisions relating to the limitation of time for the presentation of claims. Consequently, the passenger was held not bound by the terms of the tariff.

Southern Pacific Co. v. United States, 272 U. S. 445 (1926), involved the applicability of a special rail freight rate which had been filed by the plaintiff with the Interstate Commerce Commission. Since there was no provision established by law for the filing of a special tariff to govern shipments by the government, it was held that the government could not be bound by such a tariff.

New York, N. H. & H. R. Co. v. Nothnagle, 346 U. S. 128 (1953), decided that the railroad's limitation of liability, which was provided by the Carmack Amendment, was inapplicable as a limitation of liability where the railroad was sued for the loss of luggage by an employee redcap. The court held that the limitation of liability provision as to baggage carried on passenger trains referred solely to free baggage checked through on a passenger fare. It was held that such a limitation could not apply to redcap service, for which the carrier exacted a

separate charge, because the cost of providing such service was not a factor in determining passenger rates. Appellee emphasizes the importance of this holding with respect to the instant appeal, because just as the charge for redcap service had no bearing upon carriage rates in the *Nothnagle* case, neither does the charge for pick-up and delivery service bear any relation to air carriage rates in the present appeal. The essence of appellee's argument is that appellant gave no consideration for a limitation of liability, and that since the air tariff limitation provision was not authorized by law knowledge thereof was not imputed to appellee by the airbill.

**B. Appellant Has Failed to Establish That Airfreight Rules
Tariff No. 1-A Governed Its Activities.**

Rule 3.1(b) states in part, “* * * the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carrier * * * and shall inure also to the benefit of any other person, firm or corporation performing for the carrier pick-up, delivery, or other ground services in connection with the shipment.” (Emphasis added.) Appellant concludes that this provision and similar language employed in Rule 3.1(c) permit Twentieth Century to limit its liability for negligence. Appellee asserts, however, that these rules warrant no such construction.

The words “* * * the *tariffs* applicable to the shipment * * *” clearly connote that more than one tariff is applicable. Airfreight Rules Tariff No. 1-A is obviously only one of several tariffs to be considered. Appellee maintains that Twentieth Century is not entitled to the declared valuation provision of Airfreight Rules Tariff No. 1-A. If other tariffs are applicable they are not in the record.

The air carriage rate applicable to the shipment carried by TWA in the instant case was \$16.55 per cwt., as shown on the TWA airbill. In addition to their weight-rate charge, there were pick-up and delivery charges of \$1.20 and \$1.47, respectively. The weight-rate charge of \$16.55 per cwt. is a so-called "airport-to-airport" rate and contemplates only the air carriage. This is the rate which is filed by the air carrier with the Civil Aeronautics Board and is the rate upon which is based the declared valuation provision of Airfreight Rules Tariff No. 1-A, Rule 4.3. (*Cf. New York, N. H. & H. R. Co. v. Nothnagle, supra.*)

Appellee submits that the record is silent as to what tariff rules govern ground pick-up and delivery services. Tariff 1-A clearly does not provide for the ground pick-up and delivery charges shown on the TWA airbill. Appellee contends that, absent a showing of the appropriate ground services tariff, there is no justification for appellant to claim the benefits of the airfreight tariff. Appellant has the burden of establishing that the tariff which does govern its activities incorporates a limitation of liability provision. (*Hamilton Foods v. A., T. & S. F. Ry. Co.*, 83 Fed. Supp. 478 (S. D. Cal., 1948), affirmed 173 F. 2d 573 (9th Cir., 1949); *Smith v. Railway Express Agency*, 110 Fed. Supp. 911 (M. D. Tenn., 1953), affirmed 212 F. 2d 47 (6th Cir., 1954).)

**C. Appellant's Argument Ignores the Rational Basis for
Allowing a Carrier to Limit Its Liability for Negligence.**

The Supreme Court has long recognized that a carrier may limit its liability to the declared value of the shipment in consideration for reducing its carriage rates. (*New York, N. H. & H. R. Co. v. Nothnagle, supra*; *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U. S. 28 (1936); *S.S. Ansaldo San Giorgio I v.*

Rheinstrom Bros. Co., 294 U. S. 494 (1935).) The reasoning behind these decisions is that the shipper or passenger is given the benefit of reduced rates and must assume certain risks and hazards in exchange therefor. This policy has congressional sanction under the Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. A., Section 20(11).

Recognizing that reduced carriage rates are the justification for declared valuation provisions, it is entirely unreasonable that Twentieth Century should have its liability for negligence limited by the terms of the TWA airbill. TWA's liability was limited because the shipper agreed to assume the risks and hazards of air carriage in return for reduced rates. There is no showing, however, that Twentieth Century extended a comparable election of rates to Calnevar or that the delivery charge paid by Calnevar signified its acceptance of a limited liability provision.

D. As an Independent Contractor, Rather Than an Agent of TWA, Appellant Cannot Claim Benefits Which Belong to TWA.

Even if this court should reject appellee's reasoning that Twentieth Century is controlled by some tariff other than Tariff No. 1-A, appellee contends that under the terms of the service contract between the air carrier (TWA) and appellant, appellant was an independent contractor and not an agent or employee of the air carrier, and that consequently appellant does not have the status to benefit from the air carrier's limitation of liability. Clauses 3 and 8 of the Air Cargo, Inc. Service Contract are particularly relevant. Clause 3 provides in part, "* * * it being the intention of the parties hereto that Contractor

shall be and remain an independent contractor.” Clause 8 refers to liability and indemnity obligations with respect to relations between Twentieth Century and the air carrier and provides that while the shipment is in the custody or control of Twentieth Century it shall be responsible for loss or damage. Primarily, it is the apparent intention of the parties to negative any agency relationship which could impute the liability of Twentieth Century to the air carrier. It should be equally true that under an independent contractor relationship, Twentieth Century can enjoy none of the benefits accruing under the TWA Airbill or Airfreight Rules Tariff No. 1-A in favor of the air carrier.

E. Appellant's Citations of Case Authority Have No Application to the Issues Raised in This Appeal.

Appellant cites *Texas & Pacific R. Co. v. Leatherwood*, 250 U. S. 478 (1919), which held that the shipper and the connecting rail carriers were bound by the terms of the bill of lading issued by the initial carrier (Appellant's Br. p. 13). However, the *Leatherwood* case was decided solely pursuant to the Carmack Amendment, *supra*, which was enacted to remedy certain problems peculiar to the railroad industry. The primary purpose of the Carmack Amendment was to give a shipper or consignee a cause of action against the initial carrier and to make the terms of the original bill of lading binding upon all other *carriers* who participated in the shipment. It was recognized that several railroads may participate in a given rail movement and that as a matter of public convenience and necessity the shipper should not have the burden of determining which railroad is the most probable defendant in an action for loss or damage of merchandise. Here Twentieth Century is not an air carrier and there is no basis

for analogizing between connecting railroad carriers under the Carmack Amendment and pick-up or delivery truckers who service airline terminals.

The same rationale also explains the cases of *Lyon v. Canadian Pacific R. Co.*, 163 N. E. 180 (Mass., 1928), and *Georgia, Florida & Alabama R. Co. v. Blish Milling Co.*, 241 U. S. 190 (1916), cited by appellant (Appellant's Br. pp. 13, 14-15).

Appellant also cites *Western Transit Co. v. A. C. Leslie & Co.*, 242 U. S. 448 (1917), and *Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Dettlebach*, 239 U. S. 588 (1916) (Appellant's Br. pp. 13, 15-18). However, these cases merely held that a carrier may claim the benefit of limited liability provisions in a bill of lading during the period in which the carrier acts as a warehouseman at the destination. It is submitted that these cases have no application to the present appeal in that they presented situations where no party other than the carrier had custody and control of the goods. This would be analogous to a situation where the air carrier (TWA) lost or damaged goods in its custody while acting as a warehouseman in the air terminal before or after the air carriage. The question of a carrier's liability under such circumstances is not before the court in this appeal.

Appellant next cites the case of *A. M. Collins & Co. v. Panama R. Co.*, 197 F. 2d 893 (5th Cir., 1952), certiorari denied 344 U. S. 875. This case involved the ocean carriage of goods and was governed by the Carriage of Goods by Sea Act. In this case a stevedore negligently unloaded a freezer from the hold of a vessel and it was held that the stevedore was entitled to the benefits of the bill of lading, including the released valuation clause. However, this case is clearly distinguishable from the

present appeal for several reasons: (1) The Carriage of Goods by Sea Act defines carriage of goods as: “* * * the period from the time when the goods are loaded on to the time when they are discharged from the ship.” Thus the stevedore was handling the goods during the period in which the Carriage of Goods by Sea Act applied and was held entitled to the bill of lading conditions. The case in the present appeal is decidedly different, in that the damage caused by Twentieth Century occurred after the period of air carriage, assuming air carriage is the period from the time when the goods are loaded aboard the airplane to the time when they are discharged. (2) In the *Collins* case it is clear that the stevedores were engaged by the vessel as an accommodation to the vessel, and that charges incurred thereby were absorbed by the vessel. In the instant case, Twentieth Century’s charge was a distinct item on the airbill, separate and apart from the air-freight charge, *i.e.*, not absorbed by the air carrier. (3) The Fifth Circuit treated the stevedore not as an independent contractor but as an agent, and, on this rationale imputed the benefits of the bill of lading to the stevedore. (197 F. 2d at 896.) In the present appeal, it is clearly established in the Air Service Contract that the relationship of Twentieth Century to TWA was that of independent contractor rather than agent.

The dissent in the *A. M. Collins & Co.* case seems particularly noteworthy in urging that an agent who violates a duty to a third party is personally liable to the latter notwithstanding the agency relationship to his principal, and that while there may be vicarious liability imputed to the principal, there is ordinarily not vicarious immunity imputed from the principal to the agent. This argument becomes particularly persuasive when it is recognized in

the present appeal that an independent contractor rather than an agent is the responsible party.

Also, since the case was decided under the Carriage of Goods by Sea Act, the dissent argued that such statutory derogation of the common law must be strictly construed.

Appellant finally cites *Northern Fur Co. v. Minneapolis, St. Paul & S. M. M. R. Co.*, 224 F. 2d 181 (7th Cir., 1955). In this case the Railway Express Agency was the common carrier although the shipment actually moved over the lines of the Soo Railroad. It was held that the Soo was a "carrier handling the shipment" for purposes of receiving the benefit of the released valuation clause in the bill of lading. The court's rationale in this case was that if the plaintiff could recover the full value of the shipment in an action against the Soo, this would permit the plaintiff to reap undue benefits when it had paid the Railway Express a rate based upon the lesser declared value, since the Soo's revenue was directly proportionate to the rate received by the express carrier. Furthermore, as between the express company and the Soo, the express company was liable for the full amount of any judgment paid by Soo. The facts of this case clearly distinguish it from the present appeal and appear to make the *Northern Fur Co.* case entirely unpersuasive.

Appellant next alleges that by the use of the term "any other person" in Airfreight Rules Tariff No. 1-A, Rules 3.1(b) and 3.1(c), it was intended to designate a broad and unrestricted classification of parties who could benefit from the released valuation provisions (Appellant's Br. p. 22). Appellant cites the cases of *City of Buffalo v. Hannah Furnace Corp.*, 305 N. Y. 369 (1953); *Escrow, Inc. v. Borough of Haworth*, 36 N. J. Supp. 469 (1955); *State v. Small*, 111 A. 2d 201 (N. H., 1955); and *State v. Campbell*, 76 Iowa 122 (1888). In not one of these

cases did the court construe the term "any other person" to bring an independent contractor within its meaning. The *City of Buffalo* case merely held that employees of the state were deemed "any other person" for purposes of taking depositions, as provided by the New York Civil Practice Act. The *Escrow, Inc.* case merely construed a city ordinance to permit bidding at public sales by parties other than churches. *State v. Small* and *State v. Campbell* were prosecutions for violations of liquor regulations in which the courts simply refused to follow the canon of *ejusdem generis* in construing the term "any other person" in penal statutes, but, in neither case was the relationship of an independent contractor involved. Appellee contends that these cases are not persuasive in establishing the meaning of "any other person" as used in Tariff No. 1-A and, furthermore, that the intent of the air carrier to encompass a broad class of persons is irrelevant if the governing statute, 49 U. S. C. A., Sections 401 *et seq.*, is violated thereby.

Appellant alleges that Twentieth Century was "handling the shipment" for TWA at the time the coffee vending machine was damaged, citing *International Harvester Co. v. National Surety Co.*, 44 F. 2d 746 (7th Cir., 1930), certiorari denied 282 U. S. 895, and *Employers' Mut. Lia. Ins. Co. of Wisconsin v. Lloyds*, 80 Fed. Supp. 353 (W. D. Wisc., 1948) (Appellant's Br. p. 24). Appellee concedes that TWA had delegated to Twentieth Century the duty of handling the coffee vending machine and that Twentieth Century had custody and control of the machine. Thus there seems to be no question in this appeal that Twentieth Century was "handling the shipment" for TWA when the damage occurred. The issue in this appeal concerns the defense available to Twentieth Century for the consequences of its admitted negligence.

Appellant next contends that Twentieth Century, even though an independent contractor, was acting for TWA with respect to the duty TWA owed the shipper (Appellant's Br. p. 25). Appellant cites five cases for the stated proposition that Twentieth Century was acting for TWA: *Pacific Fire Insurance Company v. Kenny Boiler & Manufacturing Company*, 277 N. W. 226 (Minn., 1937); *H. W. Van Slyke Warehouse Company v. Vilter Manufacturing Company*, 291 Pac. 1103 (Wash., 1930); *Schutte v. United Electric Company*, 68 N. J. L. 435 (1902); *Davidson v. Madison Corporation*, 257 N. Y. 120 (1931); *Huckins Oil Company v. Clampitt*, 224 Pac. 945 (Okla., 1924). Each of these cases, however, merely stands for the elementary principle of contract law that an obligor who delegates his duty of performance to a subcontractor retains primary liability for breach of the contract by the subcontractor. Thus, in each of these cases an obligor-contractor was held liable for the negligent performance of the contract by a delegatee-subcontractor. These cases are entirely outside the issue raised by this appeal, since it is a question of the delegatee-subcontractor's liability presented for decision in this case, and more precisely, whether or not the subcontractor, as delegatee of the duties of the contractor, can rely on any contract defenses which exists in favor of the obligor-contractor. Appellee urges the basic proposition that a delegatee-subcontractor of duties, not being in privity of contract with the obligee, can raise no contractual defenses held by the obligor-contractor, in an action brought by the obligee against the delegatee-subcontractor.

Appellee thus distinguishes the cases cited herein by appellant, and the propositions of law for which they stand, from the facts and applicable law which govern this appeal.

II.

The Evidence Fully Supports the Trial Court's Finding That Calnevar, and Thereby the Plaintiff, St. Paul Fire & Marine Insurance Company, Suffered Loss in the Amount of \$9,625.25 by Reason of the Damage Caused by Twentieth Century to the Prototype Automatic Coffee Vending Machine.

Appellant asserts that the evidence requires a conclusion that the vending machine had expended its usefulness as a prototype and that, therefore, the liability of Twentieth Century should not exceed \$700. There is nothing in the record to justify such a conclusion.

According to the testimony of Mr. Harold Sloier, it was necessary to restore the prototype to its undamaged condition in order to prepare drawings, obtain the necessary tooling, etc., for mass production of the machine [Tr. p. 54]. The fact remains that this machine was still a prototype, and there is no evidence in the record to justify a conclusion that its prototype value was diminished, except insofar as the damage caused by appellant resulted in diminution of value. The mere fact that the record shows that similar machines could be mass produced for approximately \$700 does not warrant the conclusion that Calnevar's damages should be limited to that amount.

Appellant next contends that the payment made by St. Paul Fire & Marine Insurance Company to Calnevar was arbitrary and speculative. This contention is unwarranted in view of the report prepared by the Mat Graham Co. [Deft. Ex. A, Tr. p. 92]. Said report concluded that the most equitable basis for compensating Calnevar for its loss was to figure completion of the job in two

and one-half weeks by five men, which entailed 500 straight-time hours at \$8 per hour, 130 overtime hours at \$12 per hour, and 70 double-time hours at \$16 per hour, plus supervision and expediting expense of \$720. In addition, there were charges for cabinet finishing of \$75; trucking, \$25; plating, \$25; design painting, \$200; making the total physical damage amounting to the sum of \$7,725 [Deft. Ex. A, Tr. p. 99]. This estimate was prepared by fully qualified and competent consulting engineers and appraisers, the Mat Graham Co., and appellee submits that the trial court was entirely justified in accepting the Graham Company's recommendation.

Appellant also states that the record fails to disclose any justification for the inclusion of overtime rates in determining repair costs. However, the testimony of Mr. Sloier clearly indicates that a prototype machine has an uncertain "shelf life" with respect to the novelty of its design [Tr. pp. 53 and 54]. This means that time was of the essence in repairing the prototype in order that Calnevar could realize its reasonable objectives of selling or mass producing the machine [Tr. pp. 53 and 54].

Appellant finally argues that the record does not disclose any damage suffered by Calnevar due to loss of use of the coffee vending machine.

Appellee concedes that the loss-of-use factor, \$1,931.25, was mathematically computed under the insurance policy by taking 25 percent of the damage figure, which was \$7,725. However, damages were determined on the basis of a two and one-half week lay-up period and the

record is clear that three or four months were actually required to complete the repairs [Tr. p. 54]. Under these circumstances, appellee submits that appellant has no cause to complain of the amount of damages allowed for loss of use since the actual loss of use exceeded by several times the loss of use which was computed by the insurance company.

Respectfully submitted,

LILLICK, GEARY, MCHOSE,
ROETHKE & MYERS,

GORDON K. WRIGHT,

Attorneys for Appellee.

